Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *S. L. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 69

Tribunal File Number: GE-15-3722

BETWEEN:

S. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: May 17, 2016

DATE OF DECISION: May 20, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, S. L., was not present at the telephone hearing (teleconference) held on May 17, 2016. A notice of hearing was sent to the Appellant on March 16, 2016, to inform him about the hearing to be held on May 17, 2016 (Exhibits GD1-1 to GD1-4). On April 1, 2016, the Social Security Tribunal of Canada (the "Tribunal") received proof of delivery of the notice of hearing sent to Appellant on March 30, 2016.

[2] Since the Tribunal was satisfied that the Appellant had received notice of the hearing scheduled for May 17, 2016, it proceeded in his absence, as permitted in such a situation by section 12 of the *Social Security Tribunal Regulations*. It should be noted that the Tribunal waited more than 30 minutes after the start of the hearing May 17, 2016, to ensure that the Appellant would be present at the hearing. Despite that waiting period, the Appellant did not make his presence known.

INTRODUCTION

[3] On June 30, 2015, the Appellant filed a renewal claim for benefits effective June 28, 2015. The Appellant stated that he had worked for the employer Externat Sacré-Cœur, from January 21, 2015, to June 30, 2015, inclusive. The Appellant indicated that he would be returning to work for his employer but that the date of his return to work for that employer was unknown (Exhibits GD3-3 to GD3-12).

[4] On August 31, 2015, the Respondent, the Employment Insurance Commission of Canada (the "Commission") informed the Appellant that it could not pay him employment insurance benefits from July 1, 2015, to August 19, 2015, from December 22, 2015, to January 4, 2016, and from February 29, 2016, to March 5, 2016, because it could not pay him such benefits during the non-teaching period (Exhibits GD3-17 and GD3-18).

[5] On September 16, 2015, the Appellant made a Request for Reconsideration of an Employment Insurance (EI) decision (Exhibits GD3-19 to GD3-21).

[6] On October 20, 2015, the Commission informed the Appellant that it was upholding the decision made in his case on August 31, 2015 (Exhibits GD3-27 and GD3-28).

[7] On November 17, 2015, the Appellant filed a Notice of Appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-17).

[8] This appeal was heard by teleconference for the following reasons:

a) The Appellant was to be the only party attending the hearing ;

b) This type of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit. (Exhibits GD1-1 to GD1-4).

ISSUE

[9] The Tribunal must determine whether the imposition of disentitlement to employment insurance benefits in the Appellant's case is justified under section 33 of the *Employment Insurance Regulations* (the "Regulations") because he was unable to prove that he was entitled to receive such benefits as a teacher during a non-teaching period.

THE LAW

[10] Under "Additional Conditions and Terms in Relation to Teachers", section 33 of the Regulations provides as follows:

> […] (1) The definitions in this subsection apply in this section.
>
> ***non-teaching period*** means the period that occurs annually at regular or irregular intervals during which no work is performed by a significant number of people employed in teaching. (*période de congé*)
>
> **teaching** means the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. (*enseignement*)
>
> (2) A claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under section 22, 23, 23.1 or 23.2 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless

(a) the claimant's contract of employment for teaching has terminated;
(b) the claimant's employment in teaching was on a casual or substitute basis; or
(c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

(3) Where a claimant who was employed in teaching for any part of the claimant's qualifying period qualifies to receive benefits in respect of employment in an occupation other than teaching, the amount of benefits payable for a week of unemployment that falls within any non-teaching period of the claimant shall be limited to the amount that is payable in respect of the employment in that other occupation.

EVIDENCE

[11] The evidence in the file is as follows:

a) A record of employment, dated July 2, 2015, indicates that the Appellant worked as a [translation] "teacher" for the employer Externat Sacré-Cœur from January 21, 2015, to June 30, 2015, inclusive, and that he stopped working for that employer because of a shortage of work (Code A – Shortage of work / End of Contract or Season).
The document indicates that the anticipated recall date was August 20, 2015 (Exhibit GD3-13);

b) In statements made to the Commission on July 10, 2015, and October 14, 2015, the Appellant indicated that he had performed a replacement contract for the employer Externat Sacré-Cœur during the 2014-2015 school year. He stated that the contract was for 84% of a full teaching load and that it terminated with the end of the 2014-2015 school year (June 30, 2015). The Appellant stated that he had obtained a new contract to teach at the high school level from that same employer for the 2015-2016 school year. He explained that this was a verbal contract that he had accepted in late May 2015. The Appellant indicated that the contract was for a full teaching load (minimum 100% of a teaching load, i.e. 106% or 108% in the different statements). He said that he had not signed a contract with his employer for either the 2014-2015 or the 2015-2016 school years and that everything had taken place verbally The Appellant stated that he had taught social sciences (history and geography) at the high school level and that he had not held a unionized position. The Appellant explained that he had not accumulated seniority from year to year but that the employer recognized his years of service for his

salary level. He stated that he contributed to the Government and Public Employees Retirement Plan (RREGOP). The Appellant indicated that private schools tend to pay the salaries established for teachers working in the public sector. The Appellant stated that he had not contested the disentitlement imposed on him as of August 20, 2015, because he had started working full time as of that date (Exhibits GD3-14, GD3-15 and GD3-22 to GD3-25);

c) On August 31, 2015, the employer stated that the Appellant had had a contract during the 2014-2015 school year and that it had terminated at the end of the 2015 school year (June 30, 2015). The employer indicated that in May 2015 the Appellant had received a verbal contract offer for the 2015-2016 school year. The employer stated that the contract was for a full teaching load and that the Appellant had started on August 20, 2015, and was to finish on June 29, 2016. The employer indicated that teachers accumulated seniority with each contract and that they were entitled to a pay increase each year (Exhibit GD3-16);

d) On October 14, 2015, the employer indicated that the non-teaching period was from July 1, 2015, to August 19, 2015, inclusive (Exhibit GD3-26);

e) In connection with his Notice of Appeal filed on November 17, 2015, the Appellant submitted copies of the following documents:

   i. Letter from the Commission (reconsideration decision) sent to the Appellant on October 20, 2015 (Exhibit GD2-6 or Exhibits GD3-27 and GD3-28);

   ii. Explanatory letter from the Appellant making a case for why he was entitled to receive benefits (Exhibit GD2-7);

   iii. Appellant's pay stub issued by the employer Externat Sacré-Cœur on August 13, 2015 (period from July 26, 2015, to August 6, 2015), indicating that he taught refresher courses (Exhibit GD2-8);

iv. Record of employment dated July 2, 2015, indicating that he worked as a [translation] "teacher" for the employer Externat Sacré-Cœur, from January 21, 2015, to June 30, 2015, inclusive (Exhibit GD2-9 or GD3-13);

v. Acknowledgments of receipt of job applications the Appellant had sent to various employers (including Commission scolaire Marie-Victorin, Collège Letendre (Laval), Commission scolaire de la Seigneurie-des-Mille-Îles and Commission de la construction du Québec) during the period from April 2015 to August 2015 (Exhibits GD2-10 to GD2-13).

[12] The evidence presented at the hearing is as follows:

(a) Both parties to the case were absent from the hearing, so no evidence was presented during the hearing.

PARTIES' ARGUMENTS

[13] The Appellant made the following submissions and arguments:

a) He argued that, although he had received an offer before the end of the 2014-2015 school year, his employment was not guaranteed and someone else could have moved ahead of him (Exhibits GD3-22 to GD3-25);

b) The Appellant asserted that, for a job seeker such as him, the period from July 1, 2015, to August 19, 2015, was not a non-teaching period. According to him, it was actually a layoff period, given that the school year was over. He noted that his record of employment indicated "End of Contract or Season" and made no reference to a non-teaching period. The Appellant indicated that the Act seems to make a distinction between receiving a promise of being hired, as he did at the end of the 2014-2015 school year, and not receiving such a promise. According to him, both situations involve a layoff: a temporary one when there has been a promise of being hired and an indeterminate one when there has not. He stated that the Act authorizes the payment of benefits in the latter instance only. The Appellant asked whether this was a form of discrimination. He maintained that, according to this logic, it was better to receive such

a promise of employment shortly before classes start again in the fall; otherwise, the situation becomes suspect, incoherent or arbitrary. The Appellant asked whether it was assumed that someone who had received a promise of being hired – most of which are made verbally and can easily be cancelled, according to him – would not make an effort to find work during the summer. He noted that teachers were not paid over the summer. The Appellant indicated that he had made various efforts to find work with different school boards as well as with the Commission de la construction du Québec (CCQ). He stated that he had taught at a school for his current employer during the summer of 2015. The Appellant asked whether the Act might be perpetuating a prejudice against the teaching profession (Exhibits GD3-19 to GD3-21 and GD2-1 to GD2-13).

[14] The Commission made the following submissions and arguments:

a) Subsection 33(1) of the Regulations defines "teaching" as the occupation of teaching in a pre-elementary, an elementary or a secondary school, including a technical or vocational school. Under subsection 33(1) of the Regulations, a teacher is not entitled to receive employment insurance benefits, other than maternity and parental benefits, during a non teaching period, unless the exemption conditions set out in subsection 33(2) of the Regulations have been met: (a) the claimant's contract of employment for teaching has terminated; (b) the claimant's employment in teaching was on a casual or substitute basis; or (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching (Exhibit GD4-3);

b) The Commission asserted that the Appellant had not established that his teaching contract had ended on June 30, 2015, or that he would not be returning to his employer's employment after the non-teaching period. It noted that the Appellant had entered into another teaching contract with the same educational institution before the date on which his existing contract expired (Exhibits GD3-15, GD3-16 and GD4-3);

c) The Commission maintained that the employment relationship continued when the Appellant entered into an agreement with his employer for the next teaching period. It determined that therefore the Appellant did not meet the exemption conditions set out in paragraph 33(2)(a) of the Regulations (Exhibit GD4-3);

d) It indicated that the Appellant could not be entitled to receive benefits during the non-teaching period from July 1, 2015, to August 19, 2015, from December 22, 2015, to January 4, 2016, and from February 29, 2016, to March 5, 2016, since he had not established that he met any of the conditions for exemption set out in subsection 33(2) of the Regulations (Exhibit GD4-4);

e) The Commission argued that, notwithstanding the Appellant's assertion that he was available for work, the notion of availability was not at issue in this case (Exhibit GD4-4).

ANALYSIS

[15] Under section 33 of the Regulations, a teacher is not entitled to receive employment insurance benefits during non-teaching periods unless

> […] (a) the claimant's contract of employment for teaching has terminated; (b) the claimant's employment in teaching was on a casual or substitute basis; or (c) the claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

[16] The Federal Court of Appeal (the "Court") has upheld the principle that the exemption provided for under paragraph 33(2)(a) of the Regulations is intended to provide relief to teachers when there has been a genuine severance of the employee-employer relationship after the teaching period. Teachers whose contracts are renewed for the new school year before or shortly after their teaching contracts expire were not unemployed and there was continuity of employment. Parliament's intention with regard to section 33 of the Regulations is based in part on the premise that, unless there has been a genuine severance of the continuity of a teacher's employment, the teacher will not be entitled to benefits for the non-teaching period (***Oliver et al*, 2003 FCA 98, *Stone*, 2006 FCA 27, *Robin*, 2006 FCA 175**).

[17] In ***Lafrenière* (2013 FCA 175)**, the Court noted as follows:

> […] The intent of Parliament is to pay benefits to those individuals who, through no fault of their own, find themselves unemployed and who are seriously engaged in an earnest effort to find work. Under section 33 of the Regulations, the teachers referred to are not considered to be unemployed during the annual non-teaching periods and are therefore not entitled to receive benefits unless they meet one of the three criteria set out in subsection 33(2) of the Regulations […] the purpose of section 33 of the Regulations […] is to prevent "double dipping".

[18] In ***Oliver et al* (2003 FCA 98)**, the Court offered the following explanation:

> […] All of the decisions of this Court, except *Ying*, have denied benefits to teachers in application of paragraph 33(2)(*a*) of the Regulations. The Umpire distinguished *Ying*. He was of the view that a determination of whether a teacher fell or not within the scope of the exemption was not a determination which could be based solely on a purported date of termination stated in a contract. All the circumstances in a particular case had to be examined in light of the purpose and intention of the legislative scheme. […]With respect, I believe the Umpire understood well the governing principle endorsed by this Court in all the cases he cited and properly applied it to the facts of this case. […] All the decisions of this Court, including *Ying*, sought to determine whether there was a continuity of employment for the claimants. No such continuity was found in *Ying* as "there was a period between June 30 and August 26, 1996 when the claimant could not have been said to have a contract of employment in operation": see *Ying*, *supra*, paragraph 1. […] The legal situation is different in the case at bar. Contracts of employment were renewed prior to the expiry of the claimants' probationary contracts or very shortly thereafter. It cannot be said as in *Ying* that the claimants had no contract of employment in operation. The legal status of the claimants was analogous to those of the teachers in *Partridge*, *supra*, and in *Bishop v. Canada* (2002), FCA 276.

[19] In ***Robin* (2006 FCA 175)**, the Court stated as follows:

> […] It is not enough simply to look, as the umpire did, at the commencement and termination dates of the contract in order to determine whether a claimant's contract of employment for teaching has terminated within the meaning of paragraph 33(2)(a) of the Regulations. In addition, as we can see from *Oliver*, *supra*, it is necessary to determine whether there has been a clear severance of the continuity of the claimant's employment so that the latter has become "unemployed". The fact that an interval may exist between two contracts, during which the teacher is not under contract, does not in my opinion mean that there has been a genuine severance of the relationship between the teacher and his or her employer. It should be borne in mind that the purpose of the exercise is not to interpret contractual provisions so as to determine the respective rights of the employer and employee, but to decide whether a claimant is entitled to receive employment insurance benefits because he or she is in fact unemployed.

[20] In ***Bazinet et al* (2006 FCA 174)**, the Court stated as follows:

> […] Whereas the applicants worked as part-time teachers for the Commission scolaire from the end of August 2002 to the end of June 2003; whereas in late June 2003 the Commission scolaire made them offers of employment for the 2003-2004 school year, offers which they accepted a few days later; and as the applicants, like all the other teachers of the Commission scolaire, did not have to work during July and August 2003, I do not see how it is possible to conclude that there was any termination in the employment relationship between the applicants and the Commission scolaire. […] Accordingly, the fact of the matter is that the applicants taught in the schools of the Commission scolaire without interruption during 2002-2003 and 2003-2004. The factual situation establishes beyond any doubt that the applicants' relationship with their employer did not terminate. Therefore, there was no cessation of the continuity of their employment with the Commission scolaire. […] As to the applicants' argument that there could be no continuity of their employment since the offers of employment which they received from the Commission scolaire at the end of June 2003 were only oral offers and were made by persons not legally authorized to hire them, I am of the view that this argument is without merit. Firstly, as I mentioned earlier at paragraph 44 of my reasons, it should be borne in mind that the purpose of the exercise is not to interpret the contractual provisions so as to determine the respective rights of the employer and employees, but to decide whether a claimant is entitled to receive employment insurance benefits because he or she is in fact unemployed. Secondly, I agree with the respondent that this argument is entirely academic, in view of the fact that the applicants accepted offers made by the Commission scolaire and resumed their work on August 27, 2004, even though their contracts were not signed until fall 2004.

[21] The Tribunal notes that the Supreme Court of Canada dismissed the claimant's application for leave to appeal from that decision (***Bazinet et al*, 2006 FCA 174 – SCC 31541**).

[22] In ***Stone* (2006 FCA 27)**, the Court suggested nine factors that should be taken into account in determining whether there has been a veritable break in the continuity of the employment under paragraph 33(2)(a) of the Regulations. The Court notes that the list is not exhaustive, that the factors are not to be weighed mechanistically and that all of the circumstances of every case must be examined.

[23] Those nine factors are as follows: the length of the employment record; the duration of the non-teaching period; the customs and practices of the teaching field in issue; the receipt of compensation during the non-teaching period; the terms of the written employment contract, if any; the employer's method of recalling the claimant; the record of employment form completed by the employer; other evidence of outward recognition by the employer; and the understanding between the claimant and the employer and the respective conduct of each (***Stone* 2006 FCA 27**).

[24] The Court has also stated that the exemption provided for at the end of paragraph 33(2)(b) of the Regulations focuses on the performance of the employment and not the status of the teacher who holds it. Employment performed in a continuous and defined manner cannot be considered casual or substitute employment. Teachers who sign temporary regular teaching contracts during the school year do not meet the definition of "casual" or "substitute" teaching within the meaning of paragraph 33(2)(b) of the Regulations (***Arkinstall*, 2009 FCA 313, *Blanchet*, 2007 FCA 377**).

[25] In this case, the Tribunal finds that there was no genuine severance in the continuity of the Appellant's employment and that she cannot be entitled to receive employment insurance benefits during the non-teaching period (***Oliver et al*, 2003 FCA 98, *Stone*, 2006 FCA 27, *Bazinet et al*, 2006 FCA 174, *Robin*, 2006 FCA 175, *Arkinstall*, 2009 FCA 313, *Blanchet*, 2007 FCA 377**).

[26] The Tribunal notes that, in this case, disentitlement to receive employment insurance benefits under section 33 of the Regulations was imposed on the Appellant for the non-teaching period of July 1, 2015, to August 19, 2015, as well as for the periods from December 22, 2015, to January 4, 2016, and from February 29, 2016, to March 5, 2016 (Exhibits GD3-17 and GD3-18).

[27] The Appellant indicated that he was contesting only the disentitlement imposed on him for the period from July 1, 2015, to August 19, 2015, since he had started working full time as of August 20, 2015 (Exhibit GD3-24).

Termination of Appellant's contract of employment and continuity of employment relationship (paragraph 33(2)(a) of the Regulations)

[28] The Appellant worked as a teacher for Externat Sacré-Cœur, a private educational institution, during the 2014-2015 school year. He performed a replacement contract, representing 84% of a full teaching load, during the period from January 21, 2015, to June 30, 2015 (Exhibits GD3-3 to GD3-13 and GD3-22 to GD3-24).

[29] The Appellant stated that in late May 2015 he had accepted a new employment contract with the same employer for the 2015-2016 school year. He explained that the contract had started on August 20, 2015, that it represented a full teaching load (full time, or minimum 100% of a full teaching load) and that the contract was to end in June 2016 (Exhibits GD3-23 and GD3-24).

[30] In May 2015, when he accepted the new contract starting on August 20, 2015, the Appellant showed that there had been a clear severance of his employment relationship with Externat Sacré- Cœur.

[31] The record of employment issued by the employer on July 2, 2015, indicates that the Appellant's anticipated recall date was August 20, 2015 (Exhibit GD2-9 or GD3-13).

[32] The fact that the Appellant performed a teaching contract that ended in June 2015 and that he accepted another one in May 2015 for the 2015-2016 school year confirms the continuity of his employment relationship with his employer.

[33] The Tribunal does not accept the Appellant's argument that the period from July 1, 2015, to August 19, 2015, had been a "layoff period" rather than a "non-teaching period", since his contract had ended on June 30, 2015 (Exhibits GD2-9 and GD3-21).

[34] The Appellant's employment relationship with his employer Externat Sacré-Cœur continued as of the moment when he entered into an agreement with that employer for the school year that followed the end of his contract in June 2015. The Appellant therefore failed to establish that he would not be returning to his employer's employment after the non-teaching period.

[35] The Tribunal notes that, even if there is an interval between two contracts during which time a teacher is not under contract because of a non-teaching period, such a situation does not mean there has been a genuine severance of the relationship between the teacher and the teacher's employer (***Robin*, 2006 FCA 175**).

[36] The Tribunal therefore notes that it is not sufficient to look only at a contract's termination and commencement dates to determine whether a claimant's teaching contract has terminated within the meaning of paragraph 33(2)(a) of the Regulations; rather, it is necessary to consider whether there has been a clear severance of the continuity of the claimant's employment, thus rendering the claimant unemployed (***Oliver et al*, 2003 FCA 98, *Robin*, 2006 FCA 175**).

[37] The Tribunal notes as well that the purpose of such an undertaking is not to interpret contractual provisions to determine the respective rights of employer and employee but to decide whether a claimant might be entitled to receive employment insurance benefits he or she is unemployed (***Bazinet et al*, 2006 FCA 174, *Robin*, 2006 FCA 175**).

[38] The Tribunal further notes that the Court has held that the issue of whether or not a teacher was covered by the exemption provided for in paragraph 33(2)(a) of the Regulations cannot be determined solely on the basis of a termination date stated in a contract and that all of the circumstances of the case had to be taken into consideration in light of the purpose and intention of the legislation (***Oliver et al*, 2003 FCA 98**).

[39] The employer also stated that the period from July 1, 2015, to August 19, 2015, was in fact a non-teaching period (Exhibit GD3-26).

[40] The Tribunal also notes that in this case the Appellant accepted his new contract in May 2015, i.e. before the end of the 2014-2015 school year.

[41] The Appellant argues that his employment with his employer was not guaranteed; although he had received an offer before the end of the 2014-2015 school year, someone else could have been hired for that same position instead of him.

[42] The Tribunal does not accept the Appellant's argument on this point since the evidence shows that the Appellant started her new contract on August 20, 2015, as anticipated, after accepting the offer her employer made to her in May 2015.

[43] Regarding the Appellant's efforts to find work during the period from April 2015 to August 2015 (Exhibits GD2-10 to GD2-13), the Tribunal notes that the matter of the Appellant's availability to work is not relevant to this case.

Employment on a casual or substitute basis (paragraph 33(2)(b) of the Regulations)

[44] The Tribunal finds that paragraph 33(2)(b) of the Regulations does not apply to the Appellant's situation (***Arkinstall*, 2009 FCA 313*, Blanchet*, 2007 FCA 377**).

[45] The Tribunal finds that the contracts the Appellant performed during the 2014-2105 school year (from January 21, 2015, to June 30, 2015) and the one he accepted in 2015, for the 2015-2016 school year do not meet the definition of "casual" or "substitute" teaching within the meaning of paragraph 33(2)(b) of the Regulations (***Arkinstall*, 2009 FCA 313, *Blanchet*, 2007 FCA 377**).

Employment in an occupation other than teaching (paragraph 33(2)(c) of the Regulations)

[46] The Tribunal also finds that evidence in the file gives no indication that the Appellant qualified to receive benefits in an occupation other than teaching. Accordingly, paragraph 33(2)(c) of the Regulations does not apply in this case.

[47] On the basis of the jurisprudence cited above, the Tribunal finds that the Appellant has not established that she could be entitled as a teacher to receive benefits during a non-teaching period, since she does not meet the criteria set out in subsection 33(2) of the Regulations.

[48] Accordingly, the Commission's decision to impose disentitlement on the Appellant effective July 1, 2015, under section 33 of the Regulations is justified in the circumstances.

[49] The appeal is without merit on the issue in this case.

CONCLUSION

[50] The appeal is dismissed.

Normand Morin,
Member, General Division - Employment Insurance Section